Legal Permissibility of Unilateral Humanitarian Interventions

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Abstract: The paper explores the status of unilateral humanitarian interventions in international law. The United Nations Charter prohibits the use of force, except in case of self-defense and the collective action authorized by the Security Council. The question is whether the non-existence of unilateral humanitarian intervention among these exceptions means that they are not in conformity with the Charter and if so, whether the right to such interventions exists as the part of customary law. The issue has become even more controversial after the adoption of the "responsibility to protect" principle. Findings of legal scholars on this issue differ significantly. This paper analyzes and interprets the Charter provisions in order to answer the question of compatibility of humanitarian interventions with the Charter and examines the state practice in order to conclude whether the customary law rule allowing the humanitarian intervention exists. The conclusion of the paper is that there is no evidence to support the contentions that interventions without the Security Council authorization are permissible, although there are elements which point to the possibility of the creation of customary law allowing them.

Keywords: international law; UN Charter; human rights

1. Introduction

Unilateral humanitarian intervention denotes a military intervention undertaken by one or more states on the territory of another state in order to prevent massive human rights violations in the latter state. The legality of this type of intervention represents one of the most controversial issues in contemporary international law, primarily due to the fact that they are undertaken without the prior Security Council authorization.[2]

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[2] Since the Security Council is empowered by the UN Charter to authorize the use of military force, humanitarian interventions undertaken after obtaining such an authorization are not disputable. Also, from the scope of this paper are excluded humanitarian interventions undertaken with the consent of the state in which the intervention is taking place. Such interventions are, under customary international law, considered to be legal.

Humanitarian intervention consists of two potentially conflicting concepts: one is the concept of human rights and the other is the concept of intervention, closely connected to that of state sovereignty. On one hand, states are beyond any doubt obliged to pay respect for human rights. Such an obligation falls within the group of *erga omnes* obligations, that is those obligations directed towards international community as a whole. On the other hand, international law forbids an intervention in the internal affairs of other states, thus preserving their sovereignty.

Although humanitarian interventions are no novelty in state practice, the issue of their legality became particularly present after the adoption of the UN Charter and outlawing the use of force. The Charter provides for two exceptions to such a prohibition – a self-defence and a collective action authorized by the Security Council. Humanitarian intervention is thus not provided as an exception to the use of force and is therefore generally considered by many to be illegal.

Yet, the situation is not that simple. The collective security system established by the Charter has a flaw. The right of veto of the permanent members of the Security Council, which was intended to provide that the most important decisions regarding the international peace and security are reached with the consensus of the most powerful states in the world, serves more often than not as a means of blocking the Security Council in performing its functions under Chapter VII of the Charter. The United States (usually supported by the United Kingdom and France) and Russia (usually supported by China) are regularly being divided on questions regarding the international peace and security and due to their opposing attitudes it is difficult to agree on resolutions condemning certain actions or even more authorizing the use of force. In spite of the fact that humanitarian intervention is not provided as an exception to the use of force in the Charter, some commentators believe that it is not contrary to the Charter either. This paper will explore whether humanitarian interventions can indeed be considered to be compatible with the Charter and if not, is there a customary law right which allows undertaking of such a type of interventions.

2. The Prohibition of Intervention and the Concept of State Sovereignty

It is a well-established principle of international law that intervention in the internal affairs of another sovereign state is prohibited. It was stipulated in the Draft Declaration on Rights and Duties of States,[1] in the Friendly Relations Declaration[1]

[1] Draft Declaration on Rights and Duties of States (GA Res 375(XX)).

and in two Declarations on the Inadmissibility of Intervention.[2] The UN Charter states that "nothing … shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state," except in case of application of enforcement measures under Chapter VII.[3] The principle was confirmed in the judicial practice as well.[4]

In spite of the general acceptance of the non-intervention principle, in recent years there have been contentions that due to the changed concept of the state sovereignty, some forms of intervention might exceptionally be permitted. According to this line of reasoning, the protection of human rights does not fall within the *domaine réservé* of a particular state. (Vesel, 2003, p. 6) The concept of "popular sovereignty" is based on the idea that external intervention to depose an oppressive regime would not violate sovereignty but rather would restore sovereignty to the people. (Reisman, 1995, p. 872) This seemingly benign concept challenges the very substance of statehood in international law. (Burton, 1996, p. 424)

To be sure, the classical concept of state sovereignty has changed over time. The globalization of the world has had an influence on that process. The fact is that states with non-democratic regimes, in which rights of their own people are being violated, have become a matter of concern of the entire international community. Trends towards the modernization of the concept of sovereignty have brought into question the notion of sovereignty as the absolute control over a certain territory and have affirmed an obligation of the sovereign to rule in a way that certain basic principles, among which are the concern for the welfare of the citizens and respect for their human rights, are being taken care of.

Still, in spite of the fact that the concept of state sovereignty is gradually evolving, there is no solid ground to claim that the state practice has influenced customary law in a way that sovereignty could be derogated. So far, the only exception to the derogation of state sovereignty is, as stated in article 2(7) of the UN Charter, the undertaking of the collective action authorized by the Security Council.

[1] Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (GA Res 2625 (XXV)(1970)).
[2] Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty (GA Res 2131 (XX)); Declaration on the Inadmissibility of Intervention in the Internal Affairs of States (GA Res 36/103 (1981)).
[3] Article 2(7), UN Charter, retrieved from http://www.un.org/en/documents/charter/chapter1.shtml.
[4] See: Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 106.

3. Humanitarian Intervention and the UN Charter

3.1. Interpretation of the UN Charter

The UN Charter has established a new legal order regarding the use of force. It has almost entirely outlawed the use of force and has provided for only two exceptions to such prohibition. Although there is no explicit ban of the humanitarian intervention in the Charter, it has not been provided among the exceptions to the use of force either. That is why humanitarian interventions have mainly been considered illegal. (Benjamin, 1992-1993, p. 120)

However, there are contentions that humanitarian interventions are not necessarily contrary to the Charter. Article 2(4) of the Charter states that "all members shall refrain in their international relations from the threat or use of force against territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes and principles of the United Nations". The proponents of humanitarian intervention allege that such interventions are directed neither against territorial sovereignty nor against political independence of any state. Also, they claim that humanitarian interventions are consistent with the purposes and principles of the United Nations, namely with the Charter provisions promoting the protection of human rights.[1]

Such contentions are unacceptable for at least two reasons.

Firstly, the *travaux préparatoires* of the Charter show that the initial draft of the Charter did not even contain the phrase "against territorial integrity and political independence", meaning that the focus was not set on it. It was inserted later at the insistence of smaller states, which feared for their integrity and independence. (Chesterman, 2001, p. 49) Such an interpretation was in a certain manner confirmed by the International Court of Justice, which ruled in the Corfu Channel Case that although the action of minesweeping undertaken by the United Kingdom threatened neither the territorial sovereignty nor the political independence of Albania, the operation nevertheless violated Albania's sovereignty.

The phrase was, therefore, inserted not to limit, but rather to strengthen the prohibition of the use of force.

Secondly, it cannot be asserted that humanitarian interventions are not covered by the prohibition of Article 2(4) with the argument that they are – by promoting

[1] Articles 1(3), 55 and 56 of the Charter.

human rights – not "in any other manner inconsistent with the purposes and principles of the United Nations". Again, the phrase did not seem to have been intended to limit the scope of the prohibition of the use of force, but to emphasize that any force which is directed against principles and purposes of the United Nations, among which the maintenance of peace and security is the most important one, is forbidden. If one should have to decide on the primacy of principles promulgated by the Charter, deciding on peace and security on one side and the protection of human rights on the other side, it seems that priority should be given to the former. The analysis of the Charter text, as well as the primary intention of its adoption, suggest that peace is the highest value promulgated by the Charter. Legal writers are prone to believe that human rights have not been given the same significance as the maintenance of peace. (O'Connell, 1998, p. 473) Such hierarchy has implicitly been confirmed by the International Court of Justice, which highlighted in its judgment on Armed Activities on the Territory of the Congo that the prohibition of force represents the cornerstone of the UN Charter.[1] Besides, the protection of human rights can be achieved in many other ways other than the use of force.

3.2. Should the Right to Humanitarian Intervention be Legally Regulated?

In the debates on humanitarian intervention it has been suggested that leaving such an important issue outside the reach of international law is highly problematic and that the right to humanitarian intervention should therefore be regulated. (Richemond, 2003, p. 51)

The proponents of this idea point to some benefits that would arise out of such regulation. Two main benefits of regulation are being pointed out. First, it is sustained that setting the clear criteria for undertaking legitimate humanitarian intervention would impede states' ability to assert humanitarian rationales for illegitimate intervention. (Burton, 1996, p. 420) In this way, pretextual interventions could be avoided. In that case, undertaking humanitarian interventions would no longer be a subjective decision of states undertaking it and states would be allowed to act only if all of the necessary conditions are fulfilled. And second, regulation would restrain intervention by altruistic and well-

[1] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports 2005, p. 223.

intentioned states that, in the absence of an objective standard, might misjudge the appropriateness of intervention. (Burton, 1996, p. 420)

The proposal of regulation has on the other hand raised doubts as to the potential abuses of the right to humanitarian intervention. The intention of the Charter was to limit the use of force as much as possible. Introducing new exceptions to the use of force would mean making the use of force system more flexible, which is a somewhat risky undertaking. In spite of all that, the question nevertheless remains whether the fear of potential abuses should be a ban on legal regulation. The world has witnessed, for instance, numerous abuses of the right to self-defense, whereby states have invoked this right in circumstances which clearly did not form the basis for self-defense. Yet, these abuses are not the result of the codification of the right to self-defense. Codifying this right in the UN Charter only could have made the criteria for its undertaking stricter than they were before the codification. That is why legal regulation of humanitarian intervention, whereby strict conditions for its undertaking would be laid down, would be welcomed. But the question is how to make that happen, knowing that the formal modification of the UN Charter is not such an easy task. Article 108 of the Charter states that amendments to the Charter shall come into force for all members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the members of the United Nations, including all the permanent members of the Security Council. It is very difficult to imagine that such a controversial issue as humanitarian intervention could be agreed upon in a manner provided by the Charter. So, it seems more likely that the right to humanitarian intervention develops within customary law, if the state practice on that matter becomes frequent and general, and if that state practice is accompanied by the belief in its binding nature (*opinio juris*).

4. Humanitarian Intervention and Customary International Law

In order for a rule to be a customary law rule, two preconditions must be fulfilled: there has to be a widespread and systematic practice and there has to be *opinio juris*, that is, the belief in the legally binding nature of such practice. In determining whether a customary rule to humanitarian intervention exists, both elements have to be examined.

One of the most frequently mentioned cases of humanitarian intervention is the one undertaken in 1999 by NATO forces in Yugoslavia. The international community refused to articulate a legal argument for that humanitarian intervention. States had taken different positions with regard to intervention: some refused to justify it, others expressed discomfort about the action being contrary to Article 2(4), while some of them marked the action as "illegal but legitimate". (Williams, Stuart, 2007-2008, p. 102)

In the 20th century there was a substantial number of interventions which were allegedly directed towards saving human lives. They were practically without exception condemned by the international community, in this way or another. Let us take, for instance, examples of the United States interventions in Grenada in 1983 and in Panama in 1989. The intervention in Grenada was undertaken out of allegedly humanitarian reason, although the final goal was the change of regime in that country. The Security Council failed to formally condemn the action due to the United States veto. However, the intervention was condemned by the General Assembly, which labeled the action as a "flagrant violation of international law".[1] Similar scenario took place in Panama. The United States came out with several justifications for the action: from self-defense and the need to preserve democracy, to humanitarian reasons, primarily rescuing of its nationals. Again was the resolution condemning the action blocked by vetoes, but the General Assembly condemned the action by the significant majority of votes.[2]

Several interventions occurred in the 70s of the 20th century: Intervention of India in East Pakistan (1971), intervention of Vietnam in Kampuchea (1978-1979), intervention of France in the Central African Empire (1979), intervention of Tanzania in Uganda (1979).

[1] GA Res 38/7 (1983).
[2] GA Res 44/240 (1989).

Practically neither one of these instances of the use of force was approved by the international community. Perhaps the case of Indian intervention in East Pakistan came closest to being recognized as justified, however it seems odd that India did not even base its action on humanitarian reasons, but rather on the argument of self-defence. Intervention of Vietnam in Kampuchea was not condemned by the Security Council due to the Soviet veto, but the General Assembly expressed its condemnation by inviting all foreign forces to withdraw from Kampuchea and by calling upon all states to refrain from all acts or threats of aggression and all forms of interference in the internal affairs of states in South-East Asia.[1]

It is somewhat difficult to talk about the approval or disapproval of the international community *vis-à-vis* humanitarian interventions because many of the so-called humanitarian interventions were in fact illegal uses of force undertaken in order to accomplish some other goals. It is difficult therefore to discern which interventions were indeed "purely" humanitarian. (Franck, 2002, p. 135)

Be it as it may, it cannot be proved that there exists a general state practice with regard to unilateral humanitarian interventions. First of all, these interventions are always undertaken by powerful states against the weaker ones. Besides, even the practice of the powerful states is not uniform. While these states sometimes find it necessary to intervene in the name of human rights, in some situations, like for instance in Georgia or Chechnya, gross violations of human rights draw no such attention of these states. The overview of the state practice shows that there is neither general state practice necessary for the creation of customary law, nor is there an *opinio juris*. The lack of *opinio juris* can, among other things, be seen from the fact that in 1999 the foreign ministers of the G-77 group have adopted the Declaration in which they rejected "the so-called right of humanitarian intervention, which had no basis in the UN Charter or in international law".[2] This was the opinion of 132 member states.

All of this does not mean that such a customary law rule could not develop in the future, should the necessary requirements for the emergence of such a rule be fulfilled.

[1] GA Res 34/22 (1979).
[2] Declaration on the Occasion of the Twenty-third Annual Ministerial Meeting of the Group of 77 (New York, 24 September 1999), retrieved from http://www.g77.org/doc/Decl1999.html.

5. Responsibility to Protect

In the discussions on humanitarian intervention, it has been asserted that the term "humanitarian intervention" is completely inadequate because it brings together two contradictory terms – "humanitarian" and (military) "intervention". (Siebert, 2003, p. 60) The ICRC, for instance, seeks to promote the term "armed intervention in response to grave violations of human rights and of international humanitarian law".[1] Recently, there has been a rhetorical shift from humanitarian intervention into the "responsibility to protect".

The responsibility to protect concept originated in the international community's failures to respond adequately to massive human rights abuses, like those in Rwanda and Bosnia. While the case of Rwanda exposed the lack of a political will to intervene, Bosnia revealed the horror of inadequate intervention. (Mohamed, 2012, p. 320)

Reacting to such crises, the than-Secretary-General Kofi Annan stressed in his 2000 Millennium Report to the General Assembly the problem of reconciling the principle of sovereignty with the need to protect human rights.[2] An attempt to answer that question was given by the International Commission on Intervention and State Sovereignty (ICISS) in its 2001 report "The Responsibility to Protect" (RtoP).[3] The main idea of the RtoP concept is that each state is responsible for the protection of its people, and when the state fails to provide such protection, the international community is obliged to do so instead. Understood this way, the intervention would not contradict, but rather complete the state sovereignty. (Levitt, 2003-2004, p. 157)

The advocates of the permissibility of unilateral humanitarian interventions found in the newly coined concept of RtoP an argument in favor of their contentions. However, it seems that the RtoP concept does not differ significantly from what has traditionally been called humanitarian intervention. There are two main differences: first, the RtoP signifies the obligation, whereas humanitarian intervention is regarded as a right, and second, the RtoP refers to a wider range of

[1] The ICRC's position on "Humanitarian Intervention", retrieved from http://www.icrc.org/eng/resources/documents/misc/57jr5y.htm.
[2] Report of the Secretary – General, We the Peoples: The Role of the United Nations in the Twenty – First Century, UN Doc A/54/2000, March 27, 2000, retrieved from http://www.un.org/News/Press/docs/2000/20000403.ga9704.doc.html.
[3] The Responsibility to Protect Report, retrieved from http://responsibilitytoprotect.org/ICISS%20Report.pdf.

activities of the intervening states (RtoP refers not only to the responsibility to react, but also to responsibility to prevent and to rebuild). Apart from that, it seems that the concept has brought nothing new with regard to holders of that right. The Report stresses the primary role of the Security Council in authorizing military actions. Since the Security Council was even before authorized by the Charter to give authorizations for military actions, the Report solely confirms an already existing right. The Report further mentions the role of regional organizations under the Charter, but points out that their military actions ought to be taken with the Security Council authorization. The Report also refers to the General Assembly responsibility under the Charter for peace and security matters, as well as its power to act pursuant to the Uniting for Peace resolution. Although the Report repeatedly highlights the primary role of the Security Council in authorizing the use of force, it concludes that undertaking unilateral military actions by the *ad hoc* coalitions in situations in which the action is truly needed and the Security Council is deadlocked by veto, undermines the authority of the Security Council. It is not quite clear from the Report whether the intention of such a finding was merely to state the facts, not bringing into question the exclusive authority of the Security Council in authorizing the use of force, or was it a gateway towards the authorization of the unilateral use of force.

The RtoP concept has been discussed on several occasions, but answers as to the holders of the right have not been given. The Outcome Document of the 2005 World Summit confirmed the RtoP principle, but only with regard to the use of appropriate diplomatic, humanitarian and other peaceful means. The states also expressed preparedness for the collective action in cases in which national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity, but only through the Security Council. [1]

Within the United Nations, the High-level Panel on Threats, Challenges and Change stated that there is an emerging norm of a collective international responsibility to protect, but exercisable by the Security Council authorizing military intervention.[2] The RtoP principle was confirmed and elaborated by the UN

[1] GA Res 60/1, 2005 World Summit Outcome, retrieved from http://unpan1.un.org/intradoc/groups/public/documents/un/unpan021752.pdf.
[2] A More Secure World: Our Shared Responsibility, Report of the Secretary General's High-level Panel on Threats, Challenges and Change, retrieved from http://www.un.org/secureworld/report2.pdf.

Secretary-General as well.[1] Although the principle was with no doubt recognized within the international community, it remained quite ambiguous. First, it is not clear whether it represents a legal or a moral duty of states. And second, it has not gone any further from emphasizing the role of the Security Council in authorizing the use of force. The ICISS Report boldly intended to impose the duty upon states to react militarily in case of massive abuses of human rights in other states, but reactions to that Report, as the one expressed in the World Summit Outcome Document, show the caution in rhetoric, which can be interpreted as states' unwillingness to accept the RtoP concept as nothing more than their right (not their responsibility!), provided it was authorized by the Security Council.

6. Conclusion

The conclusion of the illegality of unilateral humanitarian intervention appears to be a logical one. To claim that such interventions could be subsumed under the UN Charter would be quite unpersuasive. It cannot be asserted that this right exists under customary law either. The practice of states necessary for the creation of such a right is neither general, nor consistent and there is a complete lack of a subjective element, that is, the *opinio juris*.

It would be quite simple to conclude that unilateral humanitarian interventions are illegitimate, while those undertaken with the Security Council authorization are permitted. However, the world has witnessed on many occasions that the Security Council did not react promptly or in no way to situations in which it was expected to. Yet, human rights atrocities within certain states do occur and it would be inappropriate to simply state that states will stand by and watch these atrocities happen without doing anything to stop them. It seems that what is legitimate is not at the same time legal in this case. An attempt has been made to overcome this gap between legitimacy and legality by introducing the RtoP concept. This shift from humanitarian intervention to RtoP has not solved the problem though. The RtoP concept remained highly ambiguous, being interpreted by each body somewhat differently. In sum, it has not been clearly articulated what the RtoP really means – is it a moral, a political or a legal category. And what is most important, there is no answer as to who is entitled to exercise this right. Are the individual states, or group of states, or international organizations allowed to do so in the absence of the Security Council action?

[1] Report of the Secretary-General, Implementing the Responsibility to Protect, retrieved from http://www.un.org/ga/search/view_doc.asp?symbol=A/63/677.

For the time being, there is no evidence that states understand RtoP as a positive duty to act under international law, which means that the introduction of the concept has in fact brought nothing new to the international law system. But even though the RtoP is at present a political, rather than a legal concept, it might gradually evolve into a customary law norm, should the necessary requirements be fulfilled. Until then, it only seems right to try to strengthen the efficiency of the Security Council in performing its functions under Chapter VII of the Charter. When speaking of delicate issues such as the use of force, institutionalization appears to be the best mechanism to avoid abuses of that right and to avoid auto-interpretation of circumstances giving rise to the use of force.

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